

Protest of	)	Date: February 27, 1989
	)	
AHJ Transportation, Inc.	)	
	)	
Under Solicitation Nos. 201-56-88,	)	P.S. Protest No. 88-81
201-57-88, 201-58-88, 201-59-88,		
201-61-88, 201-62-88, 200-01-89,		
200-02-89		

### DECISION

AHJ Transportation, Inc. (AHJ), timely protests the contracting officer's determinations that it is a nonresponsible bidder under a number of solicitations for the highway transportation of mail on an "as needed" basis issued by the Washington, DC, Transportation Management Service Center. Solicitations 201-56-88 through 201-59-88 involve service between the Seaboard System Railroad Rail Highway Terminal at Rocky Mount, NC, and various points. Solicitation 201-61-88 involves service between the Southern Railway Terminal at Rocky Mount, NC, and the Rocky Mount and Kingston, NC, post offices. Solicitation 201-62-88 involves service between an Elm City, NC, third class mailer and the Richmond, VA, General Mail Facility and other points. Solicitation 200-01-89 sought bids for the highway transportation of mail on an "as-needed" basis between Newton, NC, and various points. Solicitation 200-02-89 involves service between various postal facilities in Charlotte, NC, and the Charlotte, NC, railroad yards of CSX Transportation and the Norfolk/Southern Corporation.<sup>1/</sup> Bids were opened for individual solicitations on various days at the end of October, 1988; AHJ was the low bidder on all but two of the solicited segments.<sup>2/</sup> After bid opening, as part of establishing AHJ's responsibility, the contracting officer reviewed the "List of Parties Excluded From Procurement or Nonprocurement Programs" (Consolidated List) issued by the General Services Administration, and found that AHJ's principal, Austin P. Hatcher, Jr., appeared on the list as a result of debarment by the Department of Labor (DOL).<sup>3/</sup> By letters sent during the last week of

<sup>3/</sup> AHJ's protests against the contracting officer's determinations that it is a nonresponsible bidder on solicitation 201-56-88 through 201-59-88 and solicitation 201-61-88 are now moot. The solicitations were canceled as a result of the closing of the rail terminal which constituted one of the termini of the solicited service. Cf., Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985.

<sup>4/</sup> AHJ was not the low bidder on segment C of solicitation 201-62-88 with service between Elm City, NC, and the Huntsville, AL, metro area. Additionally, AHJ was not the low bidder on segment C of solicitation 200-01-89 with service between Newton, NC, and Buffalo, NY, metro area.

<sup>5/</sup> The notice indicated that the debarment was made by the Secretary of Labor for violation of the

October, the contracting officer advised AHJ that it was a nonresponsible bidder on each of the solicitations.

By letters of November 2 and 4, AHJ protested these findings to the contracting officer, contending that because contract award would not occur until after November 1, when Mr. Hatcher's debarment would expire, AHJ would be eligible for contract award when award was to be made. By letters of November 18, the contracting officer denied AHJ's protests as obviously without merit, indicating that, as a matter of law, AHJ was precluded from receiving award. By letter of November 21, AHJ wrote the contracting officer, advising that it wished to protest "to the next higher level of authority." The contracting officer forwarded the November 21 protest to this office.

In his statement to this office, the contracting officer urges that AHJ's protests be denied, arguing that a bidder whose principal's name appears on the Consolidated List is ineligible to bid and therefore precluded from award.<sup>17</sup> On November 19, subsequent to his denial of AHJ's protests, the contracting officer made award on several of the segments. The contracting officer made award on additional segments on December 3 and 4.<sup>17</sup>

### Discussion

The issue presented by these protests is the same one we addressed with regard to this bidder's concerns arising out of the determination of its eligibility on similar grounds by the Jacksonville, FL, Transportation Management Service Center. AHJ Transportation, Inc., P.S. Protest No. 88-76, January 12, 1989. There, we concluded that the proper time to determine a prospective awardee's ineligible status is at the time of award and not before. Before eliminating a bidder from consideration by reason of a Service Contract Act debarment, the contracting officer should be prepared to make award to another bidder. By eliminating AHJ from further consideration when he discovered that it was on the Consolidated List, the contracting officer prematurely measured the effect of AHJ's ineligibility. The Act requires a different result.

The relief to which AHJ is entitled is the same as that prescribed in our earlier decision.

Service Contract Act, 41 U.S.C. ' 354 (the Act), and would expire on November 1, 1988. According to the "Definition of Terms and Cause and Treatment Codes" portion of the Consolidated List, parties debarred for Service Contract Act violations were to be treated as follows:

Offers shall not be solicited from, nor contracts be awarded to the listed contractor or any firm, corporation, partnership, or association in which the contractor has a substantial interest. Debarment is for a three-year period to terminate on the date shown.

<sup>6/</sup> AHJ did not submit comments on the contracting officer's statement.

<sup>17/</sup> In general, Procurement Manual (PM) 4.5.5 proscribes contract award while a protest is pending. In certain cases, however, award can be made prior to resolution of the protest with appropriate higher level approval. The record before us does not indicate whether the December awards were made pursuant to PM 4.5.5 or not.

Since the period of disqualification established by the debarment has expired, the contracting officer must consider AHJ's eligibility for award without regard to its previous status as ineligible, proceeding to consider the other aspects of AHJ's responsibility pursuant to the relevant sections of the Procurement Manual. We are advised that the service which has been the subject of award has been awarded under conditions which allow the termination of the contracts on notice. If AHJ is found responsible, the awarded contracts may be terminated to allow AHJ the award.

The protests are dismissed in part and sustained in part.

William J. Jones  
Associate General Counsel  
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**[checked against original JLS 3/8/93]**